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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

EDWARD F. CLARK, JR., County Executive, and THE BOARD OF CHOSEN FREEHOLDERS,

Petitioners,

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of the Superior Court and JOHN J. DEGNAN, Attorney General of New Jersey on Behalf of Respondent,

---

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

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INDEX

PAGE

Opinion Below..... 2

Jurisdiction..... 2

Questions Presented..... 2

Statutory Provisions Involved..... 3

Statement of the Case..... 5

How Federal Question is Presented..... 8

Reasons For Granting the Writ
Preliminary Statement of the Issues Involved.11
1) The Judiciary Denied the County of Hudson Procedural Due Process.....13

2) The Decision Below Violates the Delicate Checks and Balances of the Separation of Powers As Provided For By the United States Constitution and Incorporated by the New Jersey Constitution.....17

3) The Separation of Powers Principle Should Be Held Applicable To the States As A Matter of Constitutional Law.....29

Conclusion.....40

CITATIONS

	Page
Argersinger v. Hamlin, 407 U.S. 25 (1972)	24
Arnette v. Kennedy, 416 U.S. 134, 197 (1974)	15
Baker v. Carr, 369 U.S. 186, 211 (1962)	28
Baldwin v. Hale, 1 Wall 223 (1864)	15
Bell v. Burson, 402 U.S. 535 (1971)	14
Bonham's Case, 8 Coke 13b 177 Eng. Reprint 646	15
Brown v. Heyman, 297 A2d 572-577(1977)	21,22
Carfer vs. Caldwell, 200 U.S. 293	32,34
Commonwealth ex rel Carroll v. Tate, 274 A2d 193 (1971)	16
Cooper v. California, 386 U.S. 58,62(1967)	23
David v. Vesta Co., 212 A2d 345, 357 (1967)	21
DeCatur vs. Paulding, supra at 515	26
Dodge v. Woolsey, 18 How 331	25
Dryer v. Illinois, 187 U.S. 71,84	32,33, 34,39
Eggers v. Kenney, 104 A2d 10 (1954)	21
Ex Parte Siebold, 100 W. 371	25
Fuentes v. Shevin, 407 U.S. 67,80 (1972)	15
Goldberg v. Kelly, 397 U.S. 254 (1969)	14,15
Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937)	31
Hughes v. Superior Court, 339 U.S. 460 (1950)	35

	Page
Humphrey's Executor v. United States, 295 U.S. 602,629-30 (1935)	39
In Re Haberstroh, 340 A2d 603 (1975)	16
In the Matter of the Court Reorganization Plan of Hudson County, 161 N.J. Super. 489 (App. Div., 1978), 391 A2d 1255	6,9,14, 17
In the matter of the Court Reorganization Plan of Hudson County, 78 N.J. 498,396 A2d 1144 (1979)	14,17
In the Matter of the Salary of the Juvenile Director, 552 Bd. 163, 173 (1976)	16
Johnson v. Louisiana, 406 U.S. 356,376 (1972)	23
Judges For Third Judicial Circuit, 190 N.W. 2d 228 (1971)	16
Keim v. U.S., 177 U.S. 290,298 (1879)	26
Kilbourn v. Thompson, 103 U.S. 168 (1880)	35
Lealey v. Farrell, 66 A2d 577 (1949)	16,18
Luther v. Borden, 7 How. 1 (1849)	31
Marbury v. Madison, 1 Cranch 137, 176(1803)	28
Matter of Juvenile Director, 552 P2d 163, 168(1976)	21
Mayor v. Educational League, 415 U.S. 605 (1973)	22
McCulloch v. Maryland, 4 Wheat 316	25
Millker v. Bradley, 418 U.S. 717 (1974)	25

	Page
Monaco v. Mississippi, 292 U.S. 313 (1934)	35
Myers v. U.S., 272 U.S. 2 (1926)	35,39
National Insurance Co. v. Tidewater, 337 U.S. 582,590-91 (1949)	19
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63,67 (1928)	10
O'Donoghue v. U.S., 289 U.S. 516, 530 (1933)	20,38, 39
Ogden v. Saunders, 12 Wheat 212 (1827)	25
Oxley State Co. v. Butler County, 166 U.S. 648,655 (1897)	10
Powell v. McCormack, 395 U.S. 486 549 (1969)	28
Reetz v. Michigan, 188 U.S. 505	32,34
San Antonio School District v. Rodriquez, 411 U.S. 1 (1973)	23
Schneckloth v. Bustanmonte, 412 U.S. 218 (1973)	23
Serrano v. Priest, 557 Bd 929 (1977)	23
Sinking Fund Cases, 99 U.S. 700, 718 (1879)	39
Sniadach v. Family Finance, Corp., 395 U.S. 337 (1969)	13
Springer v. Government of the Philippines, 277 U.S. 189, 201 (1928)	39

	Page
State v. Johnson, 68 N.J. 349 (1975)	23
Sweezy v. New Hampshire, 354 U.S. 234	33,35
Tumey v. Ohio, 273 U.S. 510 (1927)	15
U.S. v. Brown, 381 U.S. 437 (1965)	31,32
U.S. v. Nixon, 418 U.S. 683 707 (1974)	27,28, 35
United Public Works v. Mitchell, 330 U.S. 75 (1947)	38
Ward v. Monroeville, 409 U.S. 57 (1972)	15
Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579	19,27 38

MISCELLANEOUS

	PAGE
Antieau, Modern Constitutional Law (1969), Vol. II, P. 200	19
59 A.L.R. 3d 569	11
Baar, Seperate But Subservient: Court Budgeting in the American States (1975)	12
57 Cornell Law Review 975 (1972)	12
Douglas, Anatomy of Liberty, The Rights of Man Without Force (1963), P.54	20
Elliott, I Debates On The Federal Constitution 406 (1836)	29
Gwyn, The Meaning of the Seperation of Powers (1965) 110	19
Jefferson, Notes On The State of Virginia 120	12
1 Justice System Journal 63 (1974)	12
57 Judicature 247 (1974	12
N.J. Constitution, Article III, Sec. 1	21
N.J. Constitution, Article IV, Sec. 6, Par. 1	30
N.J.S.A. 40A:9-77	5
N.J.S.A. 40:41A-33	5
N.J.S.A. 40:41A-36	5
N.J.S.A. 40:41A-38	5
New Jersey Court Rule, R. 1:33-1	21
55 Marquette Law Review 392 (1972)	12
58 Marquette Law Review 392 (1972)	12
120 Pennsylvania Law Review 1187 (1972)	12
Spirit of the Laws, Book XI, C. 6	12
7 Suffolk University Law Review 1136 (1972)	12

MISCELLANEOUS CONTINUED

PAGE

Tribe, American Constitutional Law (1978).....24,25&33

U.S. Constitution, Article I, Sections 3 & 9.....30

53 Washington Law Review 331 (1978).....12

81 Yale Law Journal 1286 (1972).....11,18

Vile, Constitutionalism and The Separation of Powers, 133.....20,37

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19

No.

EDWARD F. CLARK, Hudson County Executive, and THE BOARD OF CHOSEN FREEHOLDERS, Petitioners

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of the Superior Court and JOHN J. DEGNAN, Attorney General of New Jersey on Behalf of Respondent

The petitioner, Edward F. Clark, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Supreme Court entered in this proceedings on January 23, 1979.

OPINION BELOW

The opinion of the New Jersey Supreme Court, not yet reported, appears in the Appendix hereto. The New Jersey Supreme Court affirmed the decision of the New Jersey Appellate Division in a two line opinion. The New Jersey Appellate Division decision also appears in the Appendix hereto.

JURISDICTION

The jurisdiction to review the decision of the New Jersey Supreme Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the legislative and executive branches of the County government of a State are to be afforded procedural due process when the state juridicary invokes its "inherent powers doctrine" to compel financing for court needs.

2. Whether the federal decisions on the separation of powers in the United States Constitution and the federal delineations of the separation of powers doctrine are controlling when the State constitution expressly copies the federal system of checks and balances.

3. Whether the separation of powers principle should be held applicable to the states as a matter of constitutional law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

a) Separation of Powers Guarantee;
Legislative, Article I, Section 1 to 9;
Executive,
Article II, Section 1 to 4; Article III,
Section 1 to 3.
Fourteenth Amendment.

New Jersey Constitution:

Distribution of The Powers of Government,
Article III, paragraph 1 (Separation of
Powers)

New Jersey Statutes:

Optional County Charter Law, Article III,
County Executive Plan, N.J.S.A. 40:41A-1 and
40:41A-31 et seq.

County Executive (executive branch)

N.J.S.A. 40:41A-33; Duties N.J.S.A. 40:41A-36;
Powers
N.J.S.A. 40:41A-37

Freeholder Board (legislative branch)

Legislative Power of County, N.J.S.A. 40:41A
-38, Board Powers,
N.J.S.A. 40:41A-41.

County Clerk

N.J.S.A. 40A:9-77 Compensation of deputy,
county clerks; chief clerks and other person-
nel.

New Jersey Court Rules:

1969 as amended

R. 1:33-3 Assignemnt Judges

(a) Duties

STATEMENT OF THE CASE

This case arose out of the Assignment Judge of the Superior Court of Hudson County's plan to reorganize the Assignemnt function which controls the court's calendar (under N.J. Court Rule 1:33-1 et seq.). In implementation of this court reorganization, the Assignment Judge selected 16 court clerks to operate the new calendar system. The Assignment Judge's court clerks or ancillary judicial personnel are provided by the office of the constitutionally elected County Clerk. New Jersey Statute 40A:9-74 provides that the County Clerk shall select and employ clerks necessary to assist the courts of the County. Compensation for the ancillary judicial personnel is to be fixed by the Board of Chosen Freeholders upon the recommendation of the County Clerk (N.J.S.A. 40A:9-77).

Under N.J.S.A. 40:41A-33, the County adopted the "County Executive Plan of Government" which provides that the County Executive, the federal equivalent of the executive branch of the government shall "prepare and submit to the Board for its consideration . . . an operating budget." N.J.S.A. 40:41A-36. The legislative power or the power of the purse is vested in the Board of Freeholders under N.J.S.A. 40:41-38 et seq.

The Assignment Judge irrationally demanded from the County pay raises for his court clerks far in excess of that negotiated by other clerks similiarly situated. When negotiations broke down, on June 8th, 1975, the Assignment Judge issued an order to show cause to Edward Clark, the County Executive and the Board of Chosen Freeholders as to why he should not receive the salary increases for his personnel. The order to show cause was returnable June 15th, 1978 in the Assignment Judge's court room before him personally.

On June 15 and 22, 1978, the Assignment Judge conducted hearings of sorts or what was better described by the New Jersey Appellate Division as a "gratuitous gesture." 161 N.J. Super. at 489, 391 A2d 1255, 1258 (1978). Despite allegations of impropriety and conflict of interest, the Assignment Judge refused to disqualify himself. Under the inherent powers doctrine of the courts, the Assignment Judge decided he had the power to compel the legislative and executive branch to appropriate additional monies for salary increases. An appeal was taken to the New Jersey Appellate Division and the New Jersey Supreme Court. Strangely enough, both courts also concluded he was right and affirmed.

Under the threat of contempt of court for disobeying a court order, the Board of Freeholders appropriated and the County Executive disbursed the additional public funds necessary to cover the judicially mandated salary increases.

HOW FEDERAL QUESTION IS PRESENTED

This case arose out of an order to show cause entered by the Assignment Judge on his motion. At the hearings on June 15th and 22nd, 1978, the County Counsel on behalf of the County Executive and the Board of Chosen Freeholders objected to the Assignment Judge hearing his own case. (1T9-16 to 1T10-14). Furthermore, the County Counsel argued at the hearings that the judiciary does not have the power to legislate monies for itself because judicial legislation violates the "separation of powers" doctrine and our system of "checks and balances". (1T14-24 to 1T15-19; 2T17-9 to 2T19-11).

The Assignment Judge ruled under the inherent powers doctrine of the courts that he had the power to determine what funds are necessary for court needs and the power to compel the executive and legislative branches of the government to provide such funds. (2T41-12 to 2T42-10). The Assignment Judge noted,

> Mr. Krieger (the County Counsel) correctly points out that this case involves a question of the doctrine of separation of powers. (2T29-13 to 15).
>
> . . . the cases generally take the view that the ultimate inherent power of the Courts to compel the payment of their reasonable necessary expenses. . . (2T39-10 to 13)
>
> As a general rule the cases have upheld the inherent powers of the Courts to obtain

> at public expense, necessary court employees or attendants. (2T39-18 to 23).
>
> . . . the court has the authority to do what it proposes to do, most reluctantly. (2T40-20 to 21).

An appeal was immediately taken as of right to the New Jersey Appellate Division where the County of Hudson's brief argued in Point II that the separation of powers clause of the New Jersey and Federal constitution was violated by the Assignment Judge and in Point IV the failure of the Assignment Judge to disqualify himself violated procedural due process. (Petitioner's brief at pages 17 and 36). On August 4, 1978, the New Jersey Appellate Division issued a written opinion in which the court ruled that separation of powers principle and procedural due process was not violated. In Re Matter of the Court Reorganization Plan of Hudson County, 161 N.J. Super. 488, 490, 391 A2d 1255 1257-58 (1978). (A copy of the opinion is appended hereto as required).

On October 4th, 1978, the New Jersey Supreme Court granted petitioner's petition for certification. The County of Hudson's petition for certification adequately briefed the federal constitutional issues in question 3, 4, and 5 of the petition. The New Jersey Supreme Court on January 23rd, 1979 in a per curiam two line opinion affirm-

ed the judgment below for the reasons expressed in the Appellate Division opinion. (The New Jersey Supreme Court opinion is attached hereto in the appendix).

Thus it is abundantly clear that the federal constitutional question was timely and properly raised. New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley State Co. v. Butler County, 166 U.S. 648, 655 (1897).

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT OF THE ISSUES INVOLVED

This petition for a writ of certiorari challenges the constitutionality of the "inherent powers" of the state courts to compel funding for ancillary personnel.

This case raises substantial federal questions of whether the judiciary in autonomously determining its own budget and then ruling on the propriety of its decision violates procedural due process as guaranteed by the fourteenth amendment. This matter also questions whether the judiciary in legislating its own budget violates the delicate checks and balances of the separation of powers as guaranteed by the United States Consittution and especially where the state constitution models the federal separation of powers principles.

The determination of the issues in this matter are of vital interest to the Fifty States of the Nation. The power of the purse issue in determination of court budgets has attracted national attention. See Hazard, McNamara, and Sentilles, "Comment, Court Finance and Unitary Budgeting," 81 Yale Law Journal 1286 (1972); Annotation, "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes," 59 ALR 3d 569, "Judicial Power - The Inherent

Power of the Courts to Compel Funding for Their Own Needs - 53 Washington Law Review 331 (1978); Comment, "State Court Assertion of Power to Determine and Demand Its Own Budget", 120 Pennsylvania Law Review 1187 (1972). C. Baar, Separate but Subservient: Court Budgeting in the American States (1975); Brennan, Judicial Fiscal Independence, 23 U. Fla. L. Rev. 277 (1971); J. Burke, The Inherent Powers of the Courts, 57 Judicature 247 (1974); J. Connors, Inherent Power of the Court - Management Tool or Rhetorical Weapon? 1 Justice System J. 63 (1974); Note, Judicial Financial Autonomy and Inherent Power". 57 Cornell L. Rev. 975 (1972); Constitutional Law, The Inherent Power of the Courts to Appripriate Money for "Reasonably Necessary" Expenditures, 55 Marquette L. Rev. 392 (1972); Comment, Inherent Power and Administrative Court Reform, 58 Marquette L. Rev. 133 (1975); Comment, Courts - Judge's Power to Bind Contractually County Treasury for Courtroom Necessities, 7 Suffolk U.L. Rev. 1136 (1972).

POINT I

THE JUDICIARY DENIED THE COUNTY OF HUDSON PROCEDURAL DUE PROCESS

The decision below raises the novel question of the extent of procedural due process to be accorded the legislative and executive branch of the government when the judiciary invokes the alleged "inherent powers" doctrine to compel financing for court needs.

Within traditional due process standards, there has been a seizing of property. cf. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). However, in this case the property was public taxpayers' monies of the County of Hudson. The seizing of the funds was done by the judiciary under its "inherent powers". Moreover, the seizure was accomplished without "due process of law" and "just compensation".

The orders entered by the Assignment Judge were directed to a member of the County Executive's staff --the Comptroller of the Currency. The County Executive was forced by the judiciary to disburse county revenues for the salary increments under the threat of contempt for disobeying a court order. Thus, the County Executive had no choice but to ultimately appropriate funds necessary to comply with the Assignment Judge's orders.

The court below skirted the issue of the denial of a full and fair hearing and the adamant refusal of the Assignment Judge to disqualify himself from hearing his own case. First, the New Jersey Appellate Division incorrectly ruled "(t)he hearing itself was not mandated by the due process requirements of proceedings involving adjudications between litigants." 161 N.J. Super. 483, 489, 391 A2d 1255, 1258 (1978). Affirmed 73 N.J. 498, 396 A2d 1144 (1979). The New Jersey court characterized the actions of the Assignment Judge as "administrative". Furthermore, the court ruled that the hearing which was not a "hearing" yet preserved the right of appeal was a "gratuitous gesture". Id. at 489. Secondly, the court concluded that Judge O'Brien need not disqualify himself from his own motion and his own case because he was acting in an "administrative function". In re Court Reorganization Plan of Hudson County, supra. at 488-489.

This Court has recognized that due process is not only applicable to criminal proceedings but to administrative hearings as well. Goldberg v. Kelly, 397 U.S. 254 (1969), Bell v. Burson, 402 U.S. 535 (1971). Therefore, the N.J. Appellate Court's characterization of the hearing as purely administrative does not remove it from the ambit of procedural due process.

It is well settled that parties whose rights are to be affected are entitled to be heard. Fuentes v. Shevin, 407 U.S. 67, 80 (1972), Baldwin v. Hale, 1 Wall. 223 (1864). The basic function of procedural due process is to afford an "opportunity to be heard at a meaningful time and in a meaningful manner" (Fuentes v. Shevin, supra.) thereby promoting fairness and accuracy in the resolution of disputes.

The Court has placed enormous weight on securing the neutrality of due process hearing. The right to an impartial decision-maker is required by due "process in every case". Arnett v. Kennedy, 416 U.S. 134, 197 (1974). It has been held that the Court will disqualify decision makers even who, in fact, have no actual bias if they might reasonably appear to be biased. Goldberg v. Kelly, 397 U.S. 254, 211 (1970).

It is axiomatic that procedural due process dictates that the Assignment Judge should have disqualified himself from the hearing. It has been firmly established since the common law that no man can be a judge of his own case. Bonham's Case, 8 Coke 13b.77 Eng. Reprint 646, Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Monroeville, 409 U.S. 57 (1972).

Furthermore, even in other jurisdictions which have dealt with the inherent powers doctrine have held that fundamental fairness dictates that cases as sub judice should be conducted by a disinterested party. In the matter of the Salary of the Juvenile Director, 552 P. 2d 163, 173 (Sup. Ct. of Washington, 1976). Moreover, in view of the dangers of the inherent powers doctrine, other prominent jurisdictions have applied a high standard of proof. Commonwealth ex rel Carroll v. Tate, 274 A2d 193 (1971), Leahey v. Farrell, 66 A2d 577 (1949), In re Haberstroh, 340 A2d 603 (1975), Judges for Third Judicial Circuit, 190 N.W. 2d 228 (Michigan, 1971). Both of these factors were glaringly absent from the instant case.

POINT II

THE DECISION BELOW VIOLATES THE DELICATE CHECKS AND BALANCES OF THE SEPARATION OF POWERS AS PROVIDED FOR BY THE UNITED STATES CONSTITUTION AND INCORPORATED BY THE NEW JERSEY CONSTITUTION

The decision below affirmed the power of the Assignment Judge to order pay raises for his Administrative Staff. 161 N.J. 483 (1978) 391 A2d 1255 (1978) affirmed 78 N.J. 498 (1979), 396 A2d 1144 (1979). In sustaining the power of the judiciary to compel financing for its ancillary personnel, the New Jersey Courts unconstitutionally misinterpreted the separation of power concept of the U.S. and State Constitutions. The Appellate Division incorrectly ruled,

> "Under the basic principle of separation of powers underlying our State and Federal Governments this judicial power must be untrammeled and independent of interference by the other branches of government, executive or legislative. Despite this doctrine of separation of powers, however, the functioning of government defies practical implementation by the creation of watertight compartments for each branch of government. (citations omitted).
>
> * * *
>
> "It follows that a court, and in this case the Assignment Judge in his administrative capacity, has the inherent power to provide the facilities, personnel and resources reasonably necessary for the performance of the judicial functions in the county. And as a corollary thereof he must have the power to compel the appropriation and expenditure of funds by the coequal executive and legislative branches of government to accomplish

such purpose, subject only to bounds of reasonable discretion. See Hazard, McNamara and Sentilles, "Court Finance and Unitary Budgeting," 81 Yale L.J. 1287-1291 (1972);" 161 N.J. Sup 483, 490-491.

In one of the leading articles on the use of "inherent power" for court financing erroneously cited in the Appellate Division opinion, commentators Hazard, McNamara and Sentilles noted that expansion of the inherent powers doctrine to the degree in New Jersey would,

> "raise significant constitutional and political difficulties. The only available source of financial support for the courts is tax revenue in the hands of other governmental units. The judiciary has no power of the purse: For the courts autonomously to tax on a systematic basis would be clearly objectionable on constitutional grounds. The taxing power is vested in the legislature, as checked by the veto of the executive; so is the power of appropriation. A judicial requisition of funds from a taxing agency, such as a county or city is in essence a judicial arrogation of discretion conferred." Court Finance and Unitary Budgeting, 81 Yale L.J. 1286, 1289(1972)

The significant constitutional question alluded to in the Yale Law Journal and the destruction of the tripartite structure of government is the reason this petition for certiorari is being filed. In Leahey v. Farrell 66 A2d 577, 579(1949) the Pennsylvania Supreme Court aptly described the pre-

vaing allocation of power among the three branches:

> "Control of State Finances vests with the legislature, subject only to constitutional limitations (citation omitted). The function of the judiciary to administer justice does not include power to levy taxes in order to defray the necessary expenses in connection herewith. It is the legislature which must supply such funds.

The separation of powers concept is basic to our concept of constitutional government. Although fundamental to our system it is not explicitly mentioned in the U.S. Constitution but there implicitly. National Insurance Co. v. Tidewater, 337 U.S. 582, 590-591 (1949). The doctrine was promoted by the Framers of the Constitution to protect the liberty of the people and to safeguard "the independence of each branch of the government and protect it from domination and interference by the others." Chester J. Antieau, Modern Constitutional Law, (1969); Vol. II p. 200. See also W. Gwyn, The Meaning of the Separation of Powers, (1965) at 110, which traces the doctrine of Baron De Montesquieu. In the seminal case on the separation of powers, Mr. Justice Douglas concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629, quoted Justice Brandeis for the proposition that:

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

This Court has stressed many times that the judiciary must have respect for the doctrine. Each of the departments is restricted to the exercise of its appointed powers and as a logical corollary, "Each department should be kept completely independent of the others . . . each shall never be controlled by or subjected, . . . to the coercive influences of either of the departments." O'Donoghue v. U.S., 289 U.S. 516, 530 (1933).

The separation of powers principle was recognized in the early State Constitutions. See M.J.C. Vile, Constitutionalism and the Separation of Powers, (1967) at pg. 133. Six of the original States incorporated the theory into their revolutionary constitutions. William O. Douglas, The Autonomy of Liberty, The Rights of Man Without Force (1963) at pg. 54. New Jersey was one of the first States to adopt separation of powers into its Constitution. M.J.C. Vile, Constitutionalism and the Separation of Powers, at pg. 133.

While the doctrine of separation of powers is not explicitly incorporated into the Constitution of the United States, it is expressly provided for in Article III, Sec. 1 of the New Jersey Constitution, which states:

> 1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The Constitution of many of the States also presently embody the Federal constitutional principle. See Matter of the Juvenile Director. 552 P2d 163, 168 (Washington, 1976).

The New Jersey Supreme Court has stated on numerous occasions that the separation of powers doctrine applicable to the Federal Government is also applicable to the N.J. State Government. Brown v. Heyman, 297 A2d 572, 577 (1977); Eggers v. Kenney, 104 A2d 10 (1954). In David v. Vesta Co., 212 A2d 345, 357 (1965), the New Jersey Supreme Court declared,

> "The doctrine of separation of powers is a fundamental principle of American government, experssly provided for in the constitutions of many states, and implied in almost all the others and in the federal government for the creation of three separate branches of government."

See also footnote 9 at p. 357 which traces the history of separation of powers in N.J. In Brown v. Heyman, supra., 279 A2d at 577, the New Jersey Supreme Court noted that the N.J. Constitution is identical to the federal scheme in its delicate distribution of power among the three branches.

Where the States voluntarily adopt the Federal distribution of governmental powers, the United States Supreme Court and Federal Court decisions govern the definitions of the Federal separation of power scheme.

In Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S. Ct. 1323 (1973). This Court stated that: "(T)he Constitution does not impose on the States any particular plan for the distribution of governmental powers." Id at 615, N. 13. However, it is important to emphasize that while the States are free to adopt any form of State Government, the above cited case cautioned "(t)his is not to say, of course, that the State of Pennsylvania may not pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit." 415 U.S. at 614, N.13. Thus the States are clearly free to adopt the Federal separation of powers scheme.

Moreover, the County of Hudson is not unmindful

of the fact that States have interpreted analogous provisions of State Constitutions differently from the United States. For example, in Serrano v. Priest, 557 P2d 929 (Calif. S. Ct. 1977), despite the fact that State constitutional equal protection clause was the "substantial equivalent" of the Fourteenth Amendment, the California Supreme Court held the California public school financing unconstitutional even though the U.S. Supreme Court held a similar school finance system constitutional in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) under Federal standards. Similarly in New Jersey in State v. Johnson, 68 N.J. 349, (1975) 346 A2d 66, the New Jersey Supreme Court held that it could impose higher standards, in effect disagreeing with Schneckloth v. Bustamonte, 412 U.S. 218 (1973) under the New Jersey Fourth Amendment which is identical to the U.S. Constitution Amendment Four. See also Cooper v. California, 386 U.S. 58, 62 (1967).

However, no United States Supreme Court opinion has specifically addressed the issue of whether the States may interpret a Federal constitutional principle different from the United States Supreme Court. In Johnson v. Louisiana, 406 U.S. 356, 376 (1972), Justice Powell in his concurring opinion

intimated in some dictum that the States are free to experiment with procedural implementation of the right to jury trial despite demands for national uniformity. But in Argersinger v. Hamlin, 407 U.S. 25 (1972), the United States Supreme Court struck down the Supreme Court of Florida's interpretation of the Sixth and Fourteenth Amendments right to counsel (236 So2d at 443). The United States Supreme Court reversed applying the "federal standard" and held that no person may be subjected to imprisonment unless secured the right to counsel. 407 U.S. supra at 28.

It is submitted that the Federal interpretation must control, otherwise, as in the separation of powers principle, we would have a situation where 50 States would be defining the Federal concept.

Research on the novel question of State incorporation of a Federal constitutional principle sheds very little light on the subject. However, Professor Laurence H. Tribe of Harvard Law School in his learned treatise (1978) at pg. 133 of American Constitutional Law has posited:

> "If a State has incorporated Federal law into its own law, as by declaring a violation of a Federal regulatory statute to be negligence, per se. See e.g., Crane v. Cedar Rapids & I.C. Ry., 395 U.S. 164 (1969); Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934); the question of whether

> the Supreme Court can review the State Court's interpretation of the incorporated Federal law becomes more substantive. By incorporating Federal law, the state does not necessarily forfeit its interest in an autonomously developing legal system: State legislatures may have adopted Federal law not because it wished to relieve its own courts of the task of dynamic interpretation, but because it concluded that the larger body of case law to which its courts would obtain access would increase the precision with which its courts would determine which of a number of interpretations best fit changing local circumstances. On the other hand, federal lawmakers may have an interest in assuring the uniform interpretation of federal standards: If the federal standard operates by its own force to regulate private conduct, for example, variant state interpretations, even if they do not actually conflict with the federal interpretation, may confuse individuals seeking to conform to federal standards, or encourage individuals wishing to circumvent federal law, and thus complicate federal law enforcement. Inevitably, therefore, the Supreme Court, in deciding whether it has jurisdiction to review state court interpretations of hybrid state law, must perform what is essentially a supremacy clause analysis: the Court must decide whether state autonomy threatens federal interests to such an extent that uniformity must prevail."

The Constitution is the supreme law of the land upon all subjects which it speaks. Odgen v. Saunders, 12 Wheat 212 (1827), Ex Parte Siebold, 100 U.S. 371, Dodge v. Woolsey, 18 How 331, McCulloch v. Maryland, 4 Wheat 316, Millker v. Bradley, 418 U.S. 717 (1974). Therefore, the separation of powers and principle of the U.S. Constitution is incorporated by the N.J. Constitution.

It was recognized by the Court that the courts

must not interfere with the rights and duties of the executive branch of the government. Kendell v. U.S., 12 Pet. 524, 619, 9 L Ed 1181 (1838), Decatur v. Paulding, 14 Pet. 497, 515. In denying a mandamus by Captain Stephen Decatur's widow upon the Secretary of the Navy, to order pension monies, Chief Justice Taney stated, "The interference of the Courts with the performance of the ordinary duties of the executive departments of government would be productive of nothing but mischief; and we are satisfied that such power was never intended to be given to them." Decatur v. Paulding, supra at 515.

In Keim v. U.S., 177 U.S. 290, 298 (1879), later reaffirmed the limited judicial role concept when it struck down a federal employee's suit to be judicially reinstated.

Accordingly, the separation of powers as guaranteed by the Federal Constitution and incorporated by the N.J. State Constitution was violated by the pay raise orders of the Assignment Judge. The fundamental recognition of distribution of powers between the three branches of government mandates that the judicial system is prohibited from intervening in the executive department of government. Decatur v. Paulding, supra. See Keim v. United States, supra. See also Green v. Frazier, 253 U.S.

233 (1920). The ability of the judiciary to intervene in the exclusive powers of another branch of government under the inherent powers doctrine is clearly without federal constitutional precedent.

Furthermore, this Court has twice held in two important cases that one branch of government may not encroach upon the exclusive powers of another. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) and U.S. v. Nixon, 418 U.S. 683, 707 (1974).

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952), Justice Frankfurter, concurring in the Court's invalidation of President Truman's steel seizure stated:

> "Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded -- too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

It is the function of the judiciary to determine what the law is and not the taxes and appropri-

ations.

"(I)t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 176 (1803). U.S. v. Nixon, 418 U.S. 683, 703 (1974). Our system of government allows the Federal Courts to interpret the Constitution in a manner at variance with the construction given the document by another branch. Powell v. McCormack, 395 U.S. 486, 549 (1969).

As this Court stated in Baker v. Carr, 369 U.S. 186, 211 (1962):

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is the responsibility of this Court, as ultimate interpreter of the constitution.

Thus, it is entirely proper for this Court to enforce the separation of powers doctrine.

POINT III

THE SEPARATION OF POWERS PRINCIPLE SHOULD BE HELD APPLICABLE TO THE STATES AS A MATTER OF CONSTITUTIONAL LAW.

The Assignment Judge's Order compelling the two branches of government to appropriate pay raise orders would be clearly unconstitutional if the separation of powers doctrine was held applicable to the States under the Fourteenth Amendment.

The case presents a prime example for the argument that the separation of powers principle should be guaranteed to the states. In debating the adoption of Article IV, Section 4 (Republican form of government-protection to the states), Governor Randolph expressed concern "because a republican government must be the basis of our National Union, and no state in it ought to have it in their power to change its government into a monarchy." Yates Minutes quoted from J. Elliott, 1 Debates on the Federal Constitution 406 (1836). Another founding father, Thomas Jefferson noted concern for undesired legislative supremacy as a "Capital defect" leading to despotic government in the revolutionary constitution of Virginia. T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1960).

In the case sub judice there is the unusual situation where there is not a state

"monarchy" as Randolph feared, or a "despotic legislative supremacy" as feared by Jefferson but "judicial tyranny". The judiciary in New Jersey has decided the propriety of its own encroachment into taxation and spending. The New Jersey Supreme Court and the Appellate Division strangely enough decided that the Assignment Judge was right in compelling public funds for pay raises for ancillary personnel. The issue here is the right of the executive and legislative branches of the government to determine the quantum of pay raises for the judiciary's support personnel. Although it could have, the County of Hudson never constitutionally questioned the Assignment Judge's need for the personnel. The County of Hudson never refused to pay salaries for the staff. The County of Hudson merely took the position that it had the constitutional responsibility to determine the amount of salary increases. The power of the purse or control of finances rests with the legislature and ultimately with the people. U.S. Constitution, Article I, Sections 8 and 9; N.J. Constitution, Article IV, Section 6, Paragraph 1. The people of the County of Hudson, through their elected representatives, have petitioned the highest court in New Jersey to redress the wrong inflicted by the judiciary. The gross disregard of the right of the

people to be free from judicial autocracy is the reason the County of Hudson has come to the highest court of the land. The County of Hudson has simply nowhere else to seek relief but with the United States Supreme Court.

The case which rang the death knell for the proposition that the Republican form of government does not embody the separation of powers guarantee is Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) in which Justice Cardozo stated,

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

Id. at 612. The underpinning of the decision is that the enforcement of the Republican form of government under Article IV, Section 4 "is for Congress, not the courts." Highland Farms Dairy, supra., at 612. Therefore, because it is well settled that there is no judicial enforcement of the republican form of government guarantee (Luther v. Borden, 7 How. 1 (1849, U.S.), if the separation of powers principle is to be applicable to the states it must be through the Fourteenth Amendment.

In examining the applicability of the separation of powers doctrine to the states it is important to discuss United States v. Brown, 381 U.S.

437 (1965) which held Sec.504 of the Labor Management Reporting and Disclosure Act of 1959 making it a crime to be a worker of the Communist Party and executive board of a labor organization to be a Bill of Attainder and therefore, unconstitutional. The majority found constitutional history demonstrated that "the Bill of Attainder clause was as a narrow, technical (and, therefore, soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simple - trial by legislature". Id. at 442 (emphasis added). Justice White hypothesized in his dissent of U.S. v. Brown that "if Article I, Sec. 9, cl. 3 immortalizes same notion of the separation of powers at the federal level, then Article I, Sec. 10 necessarily does the same for the states". Id. at 473. But Justice White criticized this line of reasoning by noting it has long been recognized by this Court that

> "(w)hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. Dreyer v. Illinois, 187 U.S. 71, 84; accord, e.g., Reetz v. Michigan, 188 U.S. 505, 507; Carfer v. Caldwell, 200 U.S. 293, 297; Sweezy v. New

Hampshire, 354 U.S. 234, 255 (Warren, C.J., announcing judgment), 256-257 (Frankfureer, J., concurring), 268 (Clark, J., dissenting). U.S. v. Brown, supra at 473."

Harvard Law Professor Laurence Tribe, in his learned treatise American Constitutional Law (1978) at 493 cryptically noted that the cases cited by Justice White in support of the Dreyer v. Illinois, view,

> "suggest only that the particular pattern of interbranch relationship employed in the federal government need not be copied by each state, not that a state would be any freer than the federal government to inflict deprivations upon identified persons by popular vote, by the sort of log-rolling process that is characteristic of representative assemblies, or indeed by any process that circumvented the safeguards of adversary hearing and judicial review". 187 U.S. 71.

Professor Tribe concluded after reviewing all the cases cited to support the proposition that the doctrine of separation of powers does not apply to the states that "(t)here is . . . no real support in the cases for the proposition that a state legislature can assume fully judicial powers" Id. at 493. It is also submitted that there is no support for the view that a state judiciary can assume legislative powers, i.e. matter of fiscal responsibility (taxation, appropriation and spending).

Clearly, the separation of powers doctrine was held not to apply to the states by the first Justice

Harlan in 1902 in the case of Dreyer v. Illinois, 187 U.S. 71, 84. In Dreyer, petitioner challenged the Illinois Interdeterminate Sentence Act as violating the separation of powers of the Illinois Constitution and the due process clause of the Fourteenth Amendment. While not referring to Article IV, Section 4, Justice Harlan stated the distribution of powers among the three branches of the Illinois State government does not "present any question under the due process clause of the Fourteenth Amendment." The underpinning of the decision was a quote by Story that "the whole power of one of these departments should not be exercised by the same bonds which possess the whole power of either of the departments; and that such exercise of the whole would subvert the principles of a free constitution." Id. at 84. Exactly what Story has stated about separation of powers has occurred in N.J. The "whole powers" of the other branches has been wrongfully exercised by the judiciary in N.J.

Dreyer has been followed in Reetz v. Michigan, 188 U.S. 505 (1903), (which upheld the power of the States to determine the qualifications of physicians); Carter v. Caldwell, 200 U.S. 293, 297 (1906), (denying a writ of habeas corpus to a prisoner held in contempt by an investigative committee of a

legislature) and Sweezy v. New Hampshire, 354 U.S. 234 (1957).

The Dreyer v. Illinois holding has been reaffirmed by this Court but essentially with no more analysis that the ipse dixit assertion that distribution of powers among the branches of State government has not been extended to the States. Hughes v. Superior Court, 339 U.S. 460, 467 (1950). In Sweezy v. New Hampshire, 354 U.S. 234, 255, this Court said in dictum that the "concept of separation of powers embodies in the United States Constitution is not mandatory in State governments". The most discussion of whether the separation of powers principle is applicable to the State was in Justice Frankfurter's concurrence where he also stated in dictum:

> "It would make the deepest inroads upon our Federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the Forty-Eight States."

Id. at 256.

The separation of powers doctrine is the dominant principle of the American political system. Kilbourn v. Thompson, 103 U.S. 168 (1880), Myers v. U.S., 272 U.S. 2 (1926), Monaco v. Mississippi, 292 U.S. 313 (1934), and U.S. v. Nixon, 418 U.S. 683 (1974). Because the separation of powers principle is so pervasive in our scheme of government, it

should be enforceable against the States as a matter of the constitutional law. Virtually all of the Fifty States embody the concept in their State Constitutions. For example, see:

1. Montgomery v. State, 231 Ala.1,163 So365(1935). 2. Hawkins v. Governor, 1 Ark. 570. 3. Abbott v. McNutt, 218 Cal. 225, 22 P2d 510(1933). 4. Denver v. Lynch, 92Colo. 102, 18 P 2d 907(1933). 5. Norwalk Street R. Co's Appeal, 69 Conn. 576, 37A 1080(1897). 6. Fla. Nat'l Bank v. Simpson, 59 So2d751(1952). 7. In Re Speer, 53 Idaho 293, 23P 2d 239 (1933). 8. Winter v. Barett, 352 Ill. 441,186 N.E. 113(1933). 9. State v. Shumaker, 200 Ind.716, 164 N.E. 408 (1929). 10. State v. Barker, 116 Iowa 96, 89 N.W. 204 (1902). 11. In Re Sims, 54 Kan. 1, 37P. 135 (1894). 12. Rouse v. Johnson, 234 Ky 473, 28 S.W. 2d745(1950). 13. State v. Warmoth, 22 La. Ann. 1. 14. State Ex Rel Young v. Butler, 105 Me.91,73A560(1909). 15. Harris v. Allegany County, 130 Md. 488, 100A733(1917). 16. In Re Opinion of Justices, 279 Mass. 607, 180 N.E. 725 (1932). 17. Anway v. Grand Rapids R. Co., 211 Mich. 592, 179 N.W. 350(1920). 18. American State Bank v. Jones 184 Minn. 489,239N.W. 144 (1931). 19. Univ. of Mississippi v. Waugh, 105 Miss. 623, 62 So827 (1913). 20. State Ex Rel Hadley v. Washburn, 167 Mo. 680, 67S.W. 592 (1902). 21. Veto Case, 69 Mont. 325, 222P. 428 (1924). 22. Tyson v. Washington County, 78 Neb. 211, 110 N.W. 634 (1906). 23. State v. Roy, 40 N.M. 397, 60P. 2d 646 (1936). 24. State Ex Rel Atty. Gen'l. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915). 25. State Ex Rel Dusher v. Watland, 51N.D. 710, 201 N.W. 680 (1924). 26. Saratoga Springs v. Saratoga Gas, 191 N.Y. 123 83 N.E. 693 (1908). 27. Zanesville v. Zanesville Tez. 64 Ohio St. 67, 59N.E. 781 (1901). 28. Riley v. Carter, 165 Okla. 262, 25 P2d 666 (1933). 29. Macartney v. Shipherd, 60 ok 133, 117 P.814 (1911). 30. Shapp v. Sloan, 27 Pa. Cmnwlth 312 367 A2d 791 (1976). 31. Henry v. Cherry, 30R.I.13, 73 A 97 (1909). 32. Bialock v. Johnson, 180 S.C. 40, 185 S.E. 61 (1936). 33. State El Rel Richards v. Cohisman, 36 S.D. 260, 154 N. W. 707 (1915). 34. Langever v. Miller, 124 Tex. 80, 76SW 2d 1025 (1934). 35. State v. Fleming, 7 Hump. (Tenn.) 152. 36. Kimball v. Grantsville City, 19 Utah 368, 57P.1 (1899). 37. Sabre v. Rutland R. Co., 86 Vt. 347, 85A 693 (1913). 38. State v. Huber, 129 W. Va. 198, 40SE 2d 11 (1946) 39. Public Serv. Comm. v. Grimshaw, 49 wyo. 158, 53 P2d 1 (1936) 40. State v Thompson, 149 Wis. 488, 137 N.W. 20 (1912). 41. State v. Fabri, 98 Wash. 207, 167 P. 133 (1917).

Thus, it would not make the deepest inroads upon our Federal system to hold this basic principle applicable to the States because it is already voluntarily incorporated. The vitality of the doctrine will be strengthened by extending it to the States because there will be only one meaning of the doctrine espoused by this Court.

The doctrine of the separation of powers along with the theory of checks and balances formed the basis of the United States Constitution. See M.J.C. Vile, Constitutionalism and the Separation of Powers, 18-19 (1967). The earlier proponents of the separation of powers doctrine formulated the theory as a safeguard against tyranny. Its essence was once described by Montesquieu:

> All would be lost if the same man or the same body of leaders, either of nobles or of the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminals and civil cases. (From W. Gwyn,

The Meaning of the Separation of Powers, 110 (1965).

> When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. (From the Spirit of the Laws, Book XI, c.6.

The Framers of the Constitution felt the separation of powers was necessary to protect the liberty of the individual and to safeguard the independence of each branch of the government by protecting it from domination and interference by the others. This Court has acknowledged that the separation of powers protects the liberty of the citizen from a dangerous accumulation of power in the trustee of governance. See Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), and O'Donogue v. U.S., 289 U.S. 516 (1933). In another important case it was noted: "(b)y these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority." United Public Works v. Mitchell, 330 U.S. 75 (1947).

It is submitted the doctrine of the separation of powers is so "implicit in our concept of ordered liberty" and so "rooted as to be fundamental" that it should be held applicable to the States by its own force or under the due process

clause of the Fourteenth Amendment. Thus, Dreyer v. Illinois, supra, should be overruled.

The separation of powers doctrine mandates three mutually exclusive branches, each entirely free from interference by the others. Numerous decisions have stated that the three branches of government are totally distinct and autonomous and that the separation of powers principle bars actions by one branch that even indirectly impinges upon another. Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935), O'Donoghue v. United States, 289 U.S. 516, 530 (1933), and Springer v. Government of the Philippines, 277 U.S. 189, 201 (1928). See also Myers v. United States, 272 U.S. 52, 167 (1926).

The integrity and independence for each branch of government requires respect for the doctrine of separation of powers. O'Donoghue v. U.S., supra. One branch of government cannot "encroach upon the domain of another without danger." Sinking Fund Cases, 99 U.S. 700, 718 (1879).

Accordingly, the acts of the Assignment "legislating" monies for his staff would be held unconstitutional.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Jersey Supreme Court.

Respectfully submitted,

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On the Petition:

Stephen F. Smith
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78-1598

Supreme Court, U. S.
FILED
APR 19 1979
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APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

EDWARD F. CLARK, JR., County Executive, and
THE BOARD OF CHOSEN FREEHOLDERS,

Petitioners,

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of
the Superior Court and JOHN J. DEGNAN,
Attorney General of New Jersey on Behlaf of
Respondent,

INDEX TO APPENDIX

Page

United States Constitution:

a) Separation of Powers Guarantee; Legislative, Article I, Section 1 to 9; Executive..... 1

Article II, Section 1 to 4; Article III, Section 1 to 3..... 1

Fourteenth Amendment.....

New Jersey Constitution:

Distribution of the Powers of Government, Article III, paragraph 1 (Separation of Powers)..... 2

New Jersey Statutes:

Optional County Charter Law, Article III, County Executive Plan, N.J.S.A. 40:41A-1 and 40:41A-31 et seq..... 2,3

County Executive (executive branch)

N.J.S.A. 40:41A-33; Duties N.J.S.A. 40:41A-36; Powers..... 4

N.J.S.A. 40:41A-37..... 8

Freeholder Board (legislative branch)

Legislative Power of County, N.J.S.A. 40:41A-38, Board Powers, N.J.S.A. 40:41A-41..... 10

County Clerk

N.J.S.A. 40A:9-77 Compensation of deputy, county clerks; chief clersk and other personnel..... 10a

Page

New Jersey Court Rules:

1969 as amended

R. 1:33-3 Assignment Judges

(a) Duties 13

Record Below

In the Matter of the Court Reorganization Plan of Hudson County, (New Jersey Supreme Court) 78 N.J. 498, 396 A2d 1144 (1979)... 15

In the Matter of the Court Reorganization Plan of Hudson County (New Jersey Appellate Division), 161 N.J. Super 483, 391 A2d 1255 (1978)..... 17

Excerpts from briefs in Appellate Division..... 34

Excerpts from petition for Certification... 36

APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II

Section 1. (1) The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Article III

Section 1. The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

ARTICLE III

DISTRIBUTION OF THE POWERS OF GOVERNMENT

1. Branches of government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N.J.S.A. 40:41A-1

MUNICIPALITIES AND COUNTIES

Article 1. Procedures for Adoption for Optional County Charter Plans

40:41A-1. Submission of charter study question

Whenever authorized by resolution of the board of freeholders or on petition of the registered voters of any county, an election shall be held in the county upon the question, "Shall a charter study commission be ~~elected~~ created to study the present governmental structure of . . . county, to consider and make findings concerning the form of county government and to make recommendations thereon?" A petition calling for such an election shall bear the signatures of a number of persons registered to vote in the county equal to or exceeding in

number ~~10%~~ 10% of the persons registered to vote in the county on the fortieeh day preceding the most recent previous primary or general election. Whenever such resolution or petition shall be filed with him, the county clerk shall provide for submission of the question at the next general election occurring not less than 60 days after the date of such filing. At the election, the question shall be submitted in the same manner as other public questions.

When a resolution or petition for the ~~election~~ creation of a charter study commission has been duly filed with the county clerk, no other such resolution or petition and no other proceedings for the adoption of any other charter or form of government available to the county may be filed unless the voters shall decide the aforesaid question in the negative or until the charter study commission ~~elected~~ created by the voters shall have been discharged.

40:41A-30. General powers

The grant of powers under this act is intended to be as broad as is consistent with the Constitution of New Jersey and with general law relating to local government. The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its own form of

government, to reorganize its structure and to alter or abolish its agencies, subject to the general mandate of performing services, whether they be performed by the agency previously established or by a new agency or another department of county government.

Based on the need to develop effective services to meet problems which cross municipal boundaries and which cannot be met effectively on an individual basis by the municipalities, the State, or other units of government, this act shall be construed as intending to give the county power to establish innovative programs and to perform such regional services as any unit that has the legal right to perform such service for itself may determine, in its own best interest, to have the county perform on a contractual basis.

ARTICLE 3. COUNTY EXECUTIVE PLAN

A. FORM OF GOVERNMENT

40:41A-31. Form; designation

The form of government provided in this article shall be known as the "county executive plan," and shall, together with articles 2 and 7 of this act,[1] govern any county whose voters have adopted it pursuant to this act.

40:41A-32 MUNICIPALITIES AND COUNTIES

40:41A-32 Elected officers

Each county operating under this article shall be governed by an elected board of freeholders and an elected county executive and by such other officers and employees as may be duly appointed pursuant to this act, general law, or ordinance.

L.1972, c.154, Sec.32, eff. Sept. 19, 1972.

B. COUNTY EXECUTIVE

40:41A-33. Qualifications, election, term

The county executive shall be a qualified voter of the county residing in the county. He shall be elected from the county at large for a term of 4 years commencing on January 1 next following his election.

L.1972, c.154, Sec.33, eff. Sept. 19, 1972.

40:41A-34. Salary

The salary of the county executive shall be fixed by ordinance of the board of freeholders; such salary shall be reasonable and commensurate with the duties of the office and with the fact that the position of county executive is and shall be a full-time position. The salary of the county executive may not be lowered during his tenure in office.

L.1972, c.154, Sec.34, eff. Sept. 19, 1972.

40:41A-35. Vacancies

The office of county executive shall be deemed vacant if the incumbent moves his residence from the county or he is by death, physical or mental illness or other casualty unable to continue to serve as county executive. Any vacancy in the office of county executive shall be filled in the manner prescribed by law for the election of county officers at the next general election occurring not less than 60 days after the occurrence of the vacancy. The board of freeholders may appoint one of their number or the chief administrator to serve as acting county executive until a successor has been elected. During the temporary absence or temporary disability of the county executive the chief administrator shall serve as acting county executive.

L.1972, c.154, Sec. 35, eff. Sept. 19, 1972.

40:41A-36. Duties.

The executive power of the county shall be exercised by the county executive. He shall:

a. Report annually to the board of freeholders and to the people on the state of the county, and the work of the previous year; he shall also recommend to the board whatever action or programs he deems necessary for the improvement of the county and the welfare of its residents. He may from time

at his discretion recommend any course of action or programs he deems necessary or desirable for the county to undertake;

b. Prepare and submit to the board for its consideration and adoption an annual operating budget, and a capital budget ~~and a capital program~~, establish the schedules and procedures to be followed by all county departments, offices and agencies in connection therewith, and supervise and administer all phases of the budgetary process ~~as set forth in sections 132 to 141 of this act~~;

c. Enforce the county charter, the county's laws and all general laws applicable thereto;

d. Supervise the care and custody of all county property, institutions and agencies;

e. Supervise the collection of revenues, ~~and he shall~~ audit and control all disbursements and expenditures and ~~shall~~ prepare a complete account of all expenditures. ~~He shall also designate the repositories of county funds~~;

f. Sign all contracts, bonds or other instruments requiring the consent of the county;

g. Review, analyze and forecast trends of county services and finances and programs of all boards, commissions, agencies and other county bodies, and report and recommend thereon to the board;

h. Develop, install and maintain centralized budgeting, personnel and purchasing procedures as may be authorized by the administrative code;

i. Negotiate contracts for the county subject to board approval; make recommendations concerning the nature and location of county improvements and execute improvements determined by the board;

j. Assure that all terms and conditions, imposed in favor of the county or its inhabitants in any statute, franchise or other contract, are faithfully kept and performed;

k. Serve as an ex-officio nonvoting member of all appointive bodies in county government.
L.1972,c.154,Sec.36, eff. Sept. 19, 1972. Amended by L.1975, c.84, Sec. 11, eff. May 5, 1975.

40:41A-37. Powers

The county executive:

a. Shall supervise, direct and control all county administrative departments;

b. With the advice and consent of the board, shall appoint the administrator, the heads of departments and, if so provided in the administrative code, of any designated divisions within such departments, and the members of all county boards, ~~and~~ commissions and authorities;

c. May, at his discretion, remove or suspend any official in the unclassified service of the

county over whose office the county executive has power of appointment in accordance with the provisions of section 87b;[1]

d. May, at his discretion, but subject to any pertinent provisions of the administrative code or civil service requirements, delegate to department heads powers of appointment and removal, ~~subject to civil service provisions~~, of their departmental employees. If the county executive does not so delegate his power he may appoint and remove, subject to civil service requirements, all employees whose positions have been ~~authorized by resolution of the board~~ created in accordance with the administrative code, ~~by civil service, or as provided in the adopted county budget~~, and the manner of whose appointment is not specified elsewhere in this article;

e. May require reports and examine the accounts, records and operations of any agency of county government;

f. May at his discretion order any agency under his jurisdiction as specified in the administrative code to undertake any task for any other agency on a temporary basis if he deems it necessary for the proper and efficient administration of the county government to do so;

g. Shall approve each ordinance of the board by

signing it, or may veto any ordinance by returning it to the clerk of the board within 10 days of passage with a written statement of his objections to the ordinance. If two-thirds of the full membership of the board, upon reconsideration of the measure, shall vote for it, the executive's veto shall be overridden and the ordinance shall become law without the executive's signature in accordance with the provisions of law.

L.1972,c.154, Sec.37, eff. Sept. 19, 1972. Amended by L.1975, c.84, Sec.12, eff. May 5, 1975; L.1975, c.257, Sec. 1, eff. Dec. 9, 1975.

C. FREEHOLDER BOARD

40:41A-38. Legislative power

The legislative power of the county shall be vested in the board of chosen freeholders.

L.1972, c.154, Sec.38, eff. Sept. 19, 1972.

40:41A-39. Chairman and vice-chairman; selection

At its organizational meeting each January the board shall select one of its members to serve as chairman and one as vice-chairman for the year.

L.1972, c.154, Sec.39, eff. Sept. 19, 1972.

40:41A-40. County executive at meetings

The county executive may be present and participate in discussions at all board meetings.

L.1972,c.154,Sec.40, eff. Sept. 19, 1972.

40A:9-77. Compensation of deputy county clerks; chief clerks and other personnel

The annual compensation of the deputy county clerk shall not exceed 3/4 of the annual compensation of the county clerk. The annual compensation of any chief clerk in the office of county clerk shall not exceed 3/5 of the annual compensation of the county clerk. The said compensations and that of all other personnel in the office of the county clerk shall be fixed by the board of chosen freeholders of the county upon the recommendation of the county clerk. The compensation of the personnel in the office of the county clerk shall be paid at the same time and in the same manner as county officers and employees are paid. The limitations of the salaries set herein shall not be construed to restrict any of the said employees from participating in or benefiting from any cost of living bonus or longevity program provided for or established in the county.

L.1971,c.200, Sec. 1, eff. July 1, 1971.

40:41A-41. Board powers

The Board of freeholders:

a. Shall advise and consent to all appointments by the executive for which board confirmation is specified under this article;

b. Shall pass in accordance with this act whatever ordinances and resolutions it deems necessary and proper for the good governance of the county;

c. ~~May~~ Shall appoint a clerk to the board who shall at its pleasure and keep the records and minutes of the board;

d. ~~May~~ Shall appoint the county counsel, to serve at the pleasure of the board. ~~The counsel shall~~ and head the county's legal department;

e. May pass a resolution of disapproval or dismissal, subject to the provisions of section 87b. of this act;[1]

f. May override a veto of the county executive by a two-thirds vote of its full membership;

g. Shall approve the annual operating and capital budgets. ~~The board may, by a majority vote reduce any item in the budget presented by the executive but may increase an item over the amount proposed by the executive only by a two-thirds vote~~ pursuant to the Local Budget Law.

L.1972, c.154, Sec.41, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 13, eff. May 5, 1975.

D. CHIEF ADMINISTRATOR

40:41A-42. Appointment

The county executive shall appoint a ~~Chief~~ an administrator who shall serve at his pleasure. The board shall advise and consent to his nomination but shall not prevent his suspension or dismissal by passage of a resolution of disapproval.
L. 1972, c. 154, Sec. 42, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 14, eff. May 5, 1975.

40:41A-43. Qualifications

The ~~chief~~ administrator shall by education, experience and ability be qualified to perform the duties established for him.

He need not be a resident of the county at the time of his appointment, but during his tenure he may live outside the county only with the permission of the county executive.
L.1972, c. 154, Sec. 43, eff. Sept. 19, 1972.
Amended by L. 1975, c. 84, Sec. 15, eff. May 5, 1975.

40:41A-44. Duties

The ~~chief~~ administrator shall be responsible only to the executive. He shall, under the direction and supervision of the executive, undertake to assist in the orderly and efficient administration

of the county, performing whatever supervisory or administrative duties the executive deems necessary and proper.

Nothing in this section shall be deemed to prohibit the ~~Chief~~ administrator's being appointed to head one or more departments on a temporary or permanent basis.
L.1972,c.154, Sec.44, eff. Sept. 19, 1972. Amended by L.1975, c. 84, Sec. 16, eff. May 5, 1975.

1:33-3. Assignment Judges

(a) Duties. The Assignment Judge shall, subject to the direction of the Chief Justice or rule of the Supreme Court, be responsible for the administration of civil and criminal justice and for the administration of all courts in the county for which he is the Assignment Judge. His duties shall include the following:

(1) The supervision of all trial judges sitting in the county and of all court clerks and other officers and employees of or serving the trial courts in the county.

(2) The supervision of the jury commissioners, the selection of all grand and petit jurors, and the organization and operation of the grand jury in the county.

(3) The supervision and expeditious movement of the civil and criminal trial calendars of the Superior and county courts and, through the judge or presiding judge thereof, of the juvenile and domestic relations court, the county district court and the municipal courts in the county.

(4) The implementation and enforcement in the county of all administrative rules, policies and directives of the Supreme Court, the Chief Justice, and the Administrative Director of the Courts.

(5) The representation of the judicial branch of government in the county in all matters pertaining to the budgets, personnel and facilities of the trial courts in the county.

(6) The performance of such other functions and duties as may be assigned him by the Chief Justice or by rule of the Supreme Court.

RULES OF GENERAL APPLICATION

(b) Power to Delegate. The Assignment Judge, subject to the approval of the Chief Justice, may delegate to any trial judge sitting in the county or to any officer or employee of the courts of the county such of the responsibilities, duties and functions imposed upon him by this rule as, in his discretion, he shall consider necessary or desirable. To assist him, he may designate, to serve at his pleasure, from among the court clerks and other em-

In the Matter of the COURT REORGANIZATION PLAN OF HUDSON COUNTY.

Supreme Court of New Jersey.

Argued Dec. 12, 1978.

Decided January 23, 1979.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 161 N.J. Super. 483, 391 A.2d 1255(1978).

Harold Krieger, Hudson County Counsel, Jersey City, for appellants Edward F. Clark, Jr., Hudson County Executive, and Bd. of Chosen Freeholders of Hudson County (Harold Krieger, attorney; Francis X. Hayes, Asst. County Counsel, Jersey City, of counsel and on the brief).

Michael R. Cole, Asst. Atty. Gen., for respondent, the Honorable Thomas S. O'Brien, Assignment Judge of Hudson County (John J. Degnan, Atty. Gen., attorney).

Randy Kopf, Asst. County Counsel, Paterson, submitted a brief on behalf of amicus curiae County of Passaic (Martin Verp, Passaic County Counsel, Paterson, attorney).

PER CURIAM.

The judgment is affirmed substantially for the reasons expressed in the opinion of the Appellate Division, 161 N.J. Super. 483, 391 A.2d 1255. For affirmance: Chief Justice HUGHES and Justices MOUNTAIN, SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER and HANDLER -7. For reversal: None.

SUPREME COURT OF NEW JERSEY
M-685 September Term 1978

IN THE MATTER OF THE COURT REORGANIZATION PLAN OF HUDSON COUNTY. : O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion of appellants for a stay of the Judgment of this Court pending an application to the United States Supreme Court for a stay is granted; and it is further

ORDERED that such stay shall remain in effect until Tuesday, February 13, 1979, provided that application for a stay is made to the United States Supreme Court no later than Friday, February 9, 1979; and it is further

ORDERED that a denial of the application to the United States Supreme Court prior to February 13, 1979 shall automatically terminate the remainder of the stay provided for by this order.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 29th day of January, 1979.

_____

Clerk

In Re The Matter of the Court Reorganization Plan of Hudson County.

Superior Court of New Jersey

Appellate Division

161 N.J. Super 483 391A2d 1255 (1978)

Argued July 18, 1978 - Decided August 4, 1978.

Before Judges Milmed, Larner and Ard.

Mr. Harold Krieger, Hudson County Counsel, argued the cause for appellants Edward F. Clark, Jr., Hudson County Executive, and Board of Chosen Freeholders of Hudson County (Mr. Frank T. Koserowski, Assistant County Counsel and Ms. Kathleen M. Grant, Assistant County Counsel, on the brief).

Mr. Michael Cole, Assistant Attorney General, argued the cause for respondent, the Honorable THomas S. O'Brien, Assignment Judge of Hudson County (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Ms. Erminie L. Conley, Assistant Attorney General, of counsel; Mr. Stacy L. Moore, Jr., Deputy Attorney general, on the brief).

The opinion of the court was delivered by

Larner, J.A.D. This appeal arises out of a series of 16 orders issued by the Assignment Judge of Hudson County in his administrative capacity in implementation of the reorganization of the assignment procedures of civil and criminal causes in that county. We stayed the implementation of these orders pending disposition of the appeal and considered the merits of the same on an accelerated basis because of the importance of an early determination to the efficient functioning of the courts of Hudson County. The orders pertain to personnel designated as assistants to the assignment judge pursuant to the authority vested in him by R. 1:33-3(b) as the chief of the judicial system in the county. The orders deal with two categories of designated assistants, one in which the appointees have been acting in that capacity in the past, and the other in which employees in another capacity have been designated as assistants to the assignment judge with different duties and responsibilities. The orders not only designate the personnel to serve as assistants, but also establish their salaries for the current year, commencing July 1, 1978.

The record abundantly demonstrates that the assignment judge and his court administrator sought to achieve the reorganization plan encompas-

sing the assignments and salary designations through normal channels of submission to the county executive and board of chosen freeholders and their representatives on numerous occasions over a long period of time. It was only when such efforts proved fruitless and the county officials failed to approve or implement the reuqests of the assignment judge that he undertook the drastic remedy of issuing an order to show cause why the county officials should not be ordered to process and implement the changes in personnel and salaries.

This order to show cause merely served as the mechanism for granting the county executive and board of chosen freeholders an opportunity to be heard and voice their objections on the question of the proposed order. The order, however, was a purely administrative one issued by the judge in his administrative capacity rather than his judicial capacity. And although a hearing was not essential at that stage of the proceeding, the opportunity for the same reflects the sensible consideration of one public official for others where the proposed action may have an impact on the discharge of the responsibilities by such other public officials.

(1) The dichotomy between administrative and judicial action of the assignment judge becomes significant on this appeal only because of

appellants' contention that due process was not afforded to them in view of the failure of Judge O'Brien to disqualify himself at the hearing. This contention is manifestly without merit since it is based upon a mistaken view of the role of an assignment judge in this administrative function relating to court personnel. The hearing itself was not mandated by the due process requirements of proceedings involving adjudications between litigants. As already noted, appellants were granted a hearing as a gratuitous gesture and Judge O'Brien did not undertake to decide a justiciable controversy; nor did he sit in review of his own action. He simply used the public forum of a courtroom to hear the views of the county officials and to express his reasons for the issuance of the administrative order. This fully accords with fundamental fairness in this area of judicial administration, preserving the right of the aggrieved parties to seek review by appeal to this court.

Although appellants initially took the position that the assignment judge was compelled to accept as his assistants under R.1:33-3(b) those employees on the county clerk's payroll who may be assigned by the county clerk, at oral argument their counsel conceded the indisputable precept that the assignment judge has exclusive power to designate as

assistants those employees of the courts whom he feels would best serve the judicial system. The issue on this appeal has thus been narrowed to the question whether the assignment jduge has the power to fix the compensation to be paid by the county to those whom he appoints as his assistants under R.1:33-3(b), which provides:

> "To assist him, he (the assignment judge) may designate, to serve at his pleasure, from among the court clerks and other employees of the courts in the county such assignment clerks and other assistants as he may deem necessary or desirable."

And if he has that power, where does the burden lie as to proof of reasonableness and necessity for the salaries fixed by him?

(2,3) Prior to our consideration of the legal aspects of this issue, we pause to observe that the record before us amply supports the need for the reorganization plan proposed by the assignment judge. It is not in our province to determine whether any plan, experimental or otherwise, should or should not be instituted in any county relating to the control of calendaring and assignment of criminal and civil causes, or whether a plan selected by an assignment judge is the best or most efficacious means of imporving the administration of justice. The assignment judge, as the chief administrator of the

county judicial system, under the overall aegis of the Supreme Court, has extensive powers and discretion to undertake new techniques and methods which he may deem appropriate to carry out his functions and responsibilities subject, of course, to the direction, if any, of the Supreme Court. In doing so he is not required to seek the prior imprimatur of the Supreme Court, as suggested by appellants, since that court has already delegated that power by the cited rule which it has adopted. And, what is more certain, he need not obtain the stamp of approval of the members of the county government in doing that which he deems appropriate to carry out his functions of administration.

(4) The judicial power is vested in the courts of this State by the Judicial Article of the New Jersey Constitution (Art. VI, Sec. 1, par.1) and the Supreme Court is empowered to make rules governing the administration of all courts (Art. VI, Sec.2, Par 3). Accordingly, the Supreme Court, through R. 1:33-3(a) and (b), has delegated to the assignment judges of the State the broad powers of administration encompassed therein. Whether it be the Supreme Court directly or the assignment judge as its alter ego in the county, this power and authority encompasses all facets of the internal management of our courts. See Passaic Cty. Probation Officers' Ass'n v. Passaic

Cty., 73 N.J. 247, 251-255 (1977). In re Brennan, 126 N.J. Super. 368, 374-375 (App. Div. 1974); Lichter v. Monmouth Cty., 114 N.J. Super. 343, 348-349 (App. Div. 1971).

(5) Under the basic principle of separation of powers underlying our State and Federal Governments, this judicial power must be untrammeled and independent of interference by the other branches of government, executive or legislative. Despite this doctrine of separation of powers, however, the functioning of government defies practical implementation by the creation of water-tight compartments for each branch of government. See In re Salaries for Probation Officers of Bergen Cty., 58 N.J. 422, 425-426 (1971). As one judge succinctly expressed it:

> It is the imperfection of human institutions which gives rise to our notion of inherent power. It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments. (Judges for Third Judicial Cir. v. County of Wayne, 383 Mich. 10, 172 N.W. 2d 436, 440 (Sup. Ct. 1969).

(6) It follows that a court, and in this case the assignment judge in his administrative capacity, has the inherent power to provide the facilities,

personnel and resources reasonably necessary for the performance of the judicial functions in the county. And as a corollary thereof he must have the power to compel the appropriation and expenditure of funds by the coequal executive and legislative branches of government to accomplish such purpose, subject only to bounds of reasonable discretion. See Hazard, McNamara and Sentilles, "Court Finance and Unitary Budgeting," 81 Yal L.J. 1286, 1287-1291 (1972); Vanderbilt, The Doctrine of Separation of Powers and Its Present-day Significance (1953); Annotation, "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes." 59 A.L.R. 3d 569)1974).

(7) We should emphasize at this point that this inherent power should be exercised very sparingly, in deference to the prerogatives of the legislative and executive branches. It should be invoked by the judicial branch only where necessary personnel and facilities are not provided by the other branches of government through the traditional and conventional methods. "The separtion-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission." In re Zicarelli, 55 N.J. 249, 264 1970).

Normally, such methods entail requests by the

assignment judge to the board of freeholders and county executive in the form of the proposed judicial budget or particular applications with factual explanations setting forth the figures and needs, together with conferences and presentations which usually result in a satisfactory resolution of the problems involved. However, as in this instance, when these normal channels and methods of cooperative efforts fail and the holders of the purse force a confrontation, the judge has the power to do whatever may be essential to the carrying out of his inherent and constitutional functions.

(8) In applying these principles to the narrow appellate issue herein we conclude that with respect to the fixing of salaries for all the employees designated as assistants to the assignment judge, the latter has the inherent power to establish the compensation for such assistants provided that the quantum thereof is reasonable and appropriate. For cases sustaining the inherent power of the judiciary not only to appoint necessary personnel but to fix their compensation see: Zylstra v. Piva, 85 Wash. 2d 743, 747-748, 539 P. 2d 823, 826-827 (Sup. Ct. 1975); State ex rel. Weinstein v. St. Louis Cty., 451 S.W. 2d 99 (Mo. Sup. Ct. 1970), Judges for Third Judic. Cir. v. Wayne Cty., 386 Mich. 1, 190 N.W. 2d 228 (Sup. Ct. 1971); Leahey v. Farrell, 362 Pa 52, 66 A. 2d 577

(Sup. Ct. 1949); Commonwealth ex rel. Carroll v. Tate, 442 Pa. 45, 274 A. 2d 193 (Sup. Ct. 1971); McAfee v. State ex rel Stodola, 258 Ind. 677, 284 N.E. 2d 778 (Sup. Ct. 1972); Noble Cty. Council v. State, 234 Ind. 172, 125 N.E. 2d 709 (Sup. Ct. 1955); Smith v. Miller, 153 Colo. 35, 384 P. 2d 738 (Sup. Ct. 1963); cases collected in Annotation, supra, 59 A.L.R. 3d 569; American Bar Association, The Improvement of the Administration of Justice 27 (1971).

(9) In testing whether the designated salaries are reasonable under all the circumstances, there should be taken into consideration the responsibilities and effort involved in the assigned posts, the experience of the individuals, the skill and talent required for each position and all the other usual elements which enter the thought processes of an employer bent upon attracting intelligent and competent personnel to handle the assigned tasks.

(10) The power of the assignment judge to select and assign as his assistants those who satisfy his needs from the coterie of county employees stems from the inherent power of the courts as implemented by R. 1:33-3(b). And although these assistants may remain county employees for the purpose of their remuneration, they nevertheless serve under the control and direction of the assignment judge in the unclassified category and at his pleasure. Similarly, although the financial

burdens related to their positions are imposed on the county, nevertheless the assignment judge has the inherent power when necessary to fix their salaries. Such a hybrid status is not unusual under our county government structures. For analogous situations see Dunne v. Fireman's Fund Am. Ins. Co., 69 N.J. 244, 248-249 (1976); In re Bigley, 55 N.J. 53 (1969); Rolleri v. Lordi, 146 N.J. Super. 297 (App. Div. 1977); In re Brennan, supra, 126 N.J. Super. 368; In re Application of Schragger, 58 N.J. 274 (1971).

Appellants also urge that the assignment judge does not have the power to fix the compensation for his assistants because of legislative enactments dealing with the appointment and fixing of salaries of personnel attached to the county clerk's office. They point to N.J.S.A. 40A:9-74, which assigns to the county clerk, a constitutional officer elected by the people, the duty to "select and employ necessary clerks and other employees," and to N.J.S.A. 40A:9-77, which provided that the compensation of all such personnel in the office of the county clerk shall be fixed by the board of chosen freehodlers. It is argued that since, under R. 1:33-3(b), the assistants designated by the assignment judge are culled from the court personnel who are on the county clerk's payroll, that only the board of chosen freeholders has the power to fix their compensation and that the order of the

assignment judge relating to compensation is therefore ultra vires and void.

As we have already noted, the inherent power of the judiciary stemming from its exclusive control of the courts and their administration is paramount to the right of the legislative or executive branches to interfere therewith. And since this inherent power is derived from constitutional imperatives it must transcend any legislative directives in conflict therewith.

We recognize the wisdom of caution and hesitancy by the judiciary in asserting such power when it conflicts with legislative enactments relating to employees who serve the judicial system. This doctrine of comity and respect for the other branches of government is firmly established as a policy determination by the Supreme Court in Passaic Cty. Probation Officers' Ass'n. v. Passaic Cty., supra:

> The conclusion is quite inescapable that the constitutional mandate given this Court to "make rules governing the administration of all courts in the State" transcends the power of the Legislature to enact statutes governing those public employees properly considered an integral part of the court system. It has, however, since 1948, been the practice of this Court, with only occasional deviation, to accept and adopt legislative arrangements that have not in any way interfered with this Court's constitutional obligation discussed above. We have every intention of continuing this practice; to do otherwise would be pointless and self-defeating. Only where we are satisfied that the proper exercise

> of our constitutional responsibility to superintend the administration of the judicial system requires such action would we feel compelled to exert this power in the adoption of a rule at odds with a legislative enactment. We repeat that in the absence of any action by this Court - felt to be constitutionally compelled - and as a matter of comity and respect for other branches of government, we accept and adopt all statutory arrangements touching or concerning the administration of any courts in the State, as well as such legislative enactments as have to do with public employees whose duties are intimately related to the judicial system. (73 N.J. at 255).

In harmony with this admonition, we particulary limit our determination to the facts herein, involving the ambit of power of an assignment judge with respect to those employees designated by him as his assistants under R. 1:33-3(b). We are not called upon at this time and therefore express no opinion on the outer bounds of that power as it may apply to other county employees whose duties are intimately related to the judicial system.

(11) In recognition of this limited scope of the litigation before us, we have no hesitancy in concluding that the constitutionally derived inherent power of the assignment judge to select his own assistants and to fix their salaries transcends the statutory power of the board of chosen freeholders to fix salaries of employees in the office of the county clerk. This conclusion is constitutionally compelled and must obtain as paramount to the general statutory pattern

relating to county employees.

(12) Having reached this conclusion, we turn to the issue whether the exercise of power in the fixing of salaries of the 16 assistants involved herein was arbitrary and capricious, for, as with all state administrative decisions, the action of the assignment judge is subject to appellate correction if it is exercised in such a manner as to exceed the bounds of reasonable discretion. As we have commented earlier in this opinion, the record fully supports the need for these assistants within the framework of the re-organization plan conceived by the assignment judge.

We also find that the salaries allocated to the positions and the particular individuals designated to fill those positions fall within the requisite standard of reasonableness. This finding applies both as to those designated for new positions with greater responsibilities and work requirements and as to those who were awarded salary increments in their present positions. Without reference to the factual complex of each position and each assistant it is manifest that the assignment judge, after a careful analysis of the relevant factors, arrived at salary figures appropriate for attracting competent and loyal workers to carry out the important administrative functions assigned to them. In fact, there is some indication that the salaries are considerably below

those earned by counterparts in other first-class counties of this State. And simply because these salaries may exceed those negotiated for other county employees or may be utilized by their labor representatives in pending contract negotiations is of no relevancy as to the appropriateness of the orders relating to the small group of special assistants herein who are not represented by the employee unions.

Appellants advance the position that the action below should be reversed because the assignment judge has failed to bear the burden of establishing that the salaries proposed by the board of chosen freeholders are so outrageously low that competent assistants cannot be found amoung court personnel who will perform the necessary services within the salary range set by the board. They contend that in the absence of such factual proof there is no basis for a finding that the county legislative body has so frustrated the administration of justice as to warrant affirmative action by the assignment judge.

(13) We agree that in view of the statutory pattern relating to salaries of court employees, the burden is on the assignment judge to establish that the appointment of the assistants and the salaries fixed by him are reasonably necessary for the efficient administration of justice. And we hold that this burden has been sustained.

We do not, however, agree with appellants' contention as applied to the facts of this case, that the court must bear the burden of proof that the salaries proposed by the board of chosen freeholders are so inadequate that no county employees can be found to fill the positions and that as a consequence the courts cannot function. Cf. Matter of Salary of Juvenile Director, 87 Wash. 2d 232, P. 2d 163, 175 (Sup. Ct. 1976); Commonwealth ex rel. Carroll v. Tate, supra, 442 Pa. at 55, 274 A. 2d at 199. To impose such a burden on the assignment judge in this sensitive and subjective area of personnel evaluation and fair compensation would be an inappropriate and insurmountable obstacle. There is no doubt that some persons with lesser qualifications can always be found to accept a particular job at any salary, inadequate or not. To require a showing that such candidates are not available from the corps s of county employees as a precondition to a finding of reasonableness of the action below would truly interfere with the judicial prerogative to select competent assistants at a fair and reasonable salary.

(14) Where the question of burden of proof arises in the limited context of designation and compensation of special assistants authorized by court rule, and the record supports a prima facie showing of reasonableness and necessity for the administrative action,

it behooves the objecting officials to undertake the burden of proving that the court's action is arbitrary and unreasonable. See McAfee v. State ex rel. Stodola, supra; 258 Ind. at 681, 284 N.E. 2d at 782.

Neither the record below nor that on appeal presents a semblance of proof by appellants that the judge's orders are arbitrary and beyond the bounds of reasonable necessity. Appellants' bald assertion that they disagree with the salary schedule or that they feel that lesser salaries would be more appropriate from their viewpoint as elected officials does not serve to establish the arbitrariness which is a prerequisite to appellate interference with the assignment judge's administrative discretion. In the absence of abuse of that discretion, this court will not disturb the orders by which the assignment judge exercised his authority.

The decision below is therefore affirmed, and the stay heretofore granted is dissolved. [1]

1. Appellants also moved to expunge from the record certain confidential material sealed by the assignment judge which was obliquely referred to in his fingings. This material was not submitted to this court and was not seen or considered by us in the determination of this appeal. As a consequence, the motion to expunge is denied.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4302-77

CIVIL ACTION

ON APPEAL FROM

IN RE MATTER OF THE COURT REORGANIZATION PLAN OF HUDSON COUNTY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

SAT BELOW

Hon. Thomas S. O'Brien, A.J.S.C.

BRIEF AND APPENDIX
FOR
DEFENDANTS-APPELLANTS

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POINT II

SEPARATION OF POWERS CLAUSE OF THE NEW JERSEY CONSTITUTION HAS BEEN VIOLATED WHEN THE JUDICIARY INFRINGES UPON THE FISCAL POWERS OF THE LEGISLATURE.

It is a basic concept of our constitutional form of Republican Government that the legislature is an independent and co-equal Board of Government, along with the Judicial and Executive Branches. The doctrine of separation of powers is not confined to the federal constitution. As noted by Justice William O. Douglas in The Anatomy of Liberty, The Rights of Man Without Force (1963), at page 54:

> "Six of the original states explicitly affirmed the doctrine of the separation of powers. Today the theory is formally announced in about forty state constitutions. The other states make no such formal declaration; nor does the Constitution of the United States. Yet the same result is reached because these other states' constitutions, as the federal constitution, create three departments of government, vesting the executive power in one, the legislative power in another, and the judicial power in a third."

New Jersey is among those states which divide the powers of government into three distinct departments. Article III. Sec. 1, Constitution of New Jersey 1947:

> "1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either or the others, except as expressly provided in this Constitution."

POINT IV

FAILURE OF THE ASSIGNMENT JUDGE TO DISQUALIFY HIMSELF DENIED A FAIR HEARING AND VIOLATED N.J.S.A. CONSTITUTION ARTICLE I, PARAGRAPH I

N.J.S.A. Constitution Article I, Paragraph I provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

This provision has been interpreted to confirm a right of procedural due process and the right to procedural due process requires any hearing, judicial or quasi-judicial, to possess the elements of fundamental fairness. David v. Strelecki, 97 N.J. Super. 360 (App. Div. 1967) reversed on other grounds.

Furthermore, N.J. Court Rule 1:12-1 provides:

> "Cause for Disqualification; On the Courts Motion. The judge of any court shall disqualify himself on his own motion and shall not sit in any manner, if he
>
> * * * *
>
> (e) is interested in the action; or (f) when there is any reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

In the case at bar, it appears that the assignment Judge should not have presided over the hearing.

SUPREME COURT OF NEW JERSEY

DOCKET NO.

IN THE MATTER OF THE COURT)
REORGANIZATION PLAN OF)
HUDSON COUNTY) SAT BELOW

Judge S. Larner
Judge L. Milmed
Judge J. Ard

PETITION FOR CERTIFICATION

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STATEMENT OF QUESTIONS INVOLVED

1. Were the show cause orders issued in this case judicial orders or administrative orders?

2. Under what circumstances can the doctrine of inherent judicial authority be exercised?

3. Were the Petitioners denied a fair hearing and procedural due process? Should the Assignment Judge have disqualified himself from conducting the hearing? Was he in conflict of interest?

4. Did the action of the Assignment Judge constitute an improper check on the legislative branch by the judicial branch?

5. Does the constitutional plenary administrative power of the courts override the constitutional plenary legislative power of taxation and regulation of the fiscal affairs of the state? If so, under what circumstances?

Note These are the same constitutional questions that would be raised on an appeal as of right.